PROGRESS OF THE LAW.

As Marked by Decisions Selected from the Advance Reports.

ADVANCEMENTS.

Time at which Value Fixed

The statute law in Arkansas provides that the value of personal estate advanced shall be estimated according to its value at the time it is advanced, when no receipt specifying its value has been given. Nevertheless the Supreme Court of the State, in *Culberhouse* v. *Culberhouse*, 59 S. W. 38, where the property advanced consisted of a horse and a life-insurance policy, while applying the rule to the horse, holds that as to the insurance policy the estimate should be as of the time when the right of possession or beneficial interest accrued. The court regards this rule as in consonance with equity, and to be presumed from the facts of the case as the intention of the father. *A fortiori* that would seem a proper holding where there is no such statute as above noted.

APPEAL.

Destruction of Subject-Matter, Costs

In *Southwestern Telegraph and Telephone Co.* v. *Galveston County*, 59 S. W. 589, it appeared that the lower court had entered judgment commanding the defendant to remove from the plaintiff's bridge across Galveston Bay its wires and structures placed thereon, and enjoining further use thereof. Both the bridge and the wires and structures were destroyed by the great storm of September 8, 1900. An appeal having been taken to the Court of Civil Appeals it was held that the appellate court would not entertain the appeal merely to determine costs. In such case the court holds the proper practice is to dismiss the case—not the appeal—the effect of which is to annul the judgment below.

ARCHITECT'S LIEN.

Preparing Plans, Superintending Building

It is held in *Johnson* v. *McClure*, 62 Pac. 983, by the Supreme Court of New Mexico, that an architect who prepares plans and specifications for a building, and superintends the construction of such building in accordance with the plans, has a lien for his services, both in preparing the plans and specifications and

ARCHITECT'S LIEN (Continued).

in superintending such construction. Bodily toil in the form of manual labor "is not in all cases," says the court, "necessary to entitle to a lien." *Bank* v. *Gries*, 35 Pa. 423, is cited as in accord. The court says a different doctrine obtains where the architect merely furnishes plans, but does not superintend. Of course the lien falls in the class of statutory liens, but exhibits the construction of such statutes.

BILLS AND NOTES.

Rate of Interest, What Law Governs

In *Eccles* v. *Herrick*, 62 Pac. 1040, the Court of Appeals of Colorado holds that a stipulation in a note to pay interest at the rate prevailing at the place of contract is valid, though exceeding the rate allowable at the place of payment. And further, that a note stipulating for additional interest, not exceeding the legal rate, in case of default in the payment of interest, is not an agreement for a penalty, but a valid agreement to pay a higher rate on a contingency.

CONFESSIONS.

Involuntary, Corroborated by Facts

In *Whitley* v. *State*, 28 Southern, 852, it appeared that the defendant, accused of murder, had confessed, under the influence of threats to deliver him to a mob, that he had murdered the deceased and had taken from him a sack of money which he had put at a certain place. Search being made at that place the money was found. Nevertheless the Supreme Court of Mississippi holds this part of the confession, as well as the rest, inadmissible—a holding apparently at variance with the usual rule, that facts discovered in consequence of a confession improperly obtained and so much of the confession as relates thereto may be received.

CONSTITUTIONAL LAW.

Taking Property Assessment for Paving Street

The charter of Kansas City authorized the city to apportion a special paving assessment on the abutting property owners in proportion to the frontage of their property. An ordinance authorizing the paving of a street with asphalt and the levy of a special assessment according to the front-foot rule was regularly passed, and the street was paved and the assessment made in strict conformity thereto, and no fraud was practiced. The abutting property owner claimed that this

CONSTITUTIONAL LAW (Continued).

amounted to a taking of property without due process of law and hence was violative of the National Constitution. But the Supreme Court of Missouri held in *Barber Asphalt Paving Company* v. *French*, 58 S. W. 934, that such assessment was in accordance with a just and equitable rule and was not void. The case of *Norwood* v. *Baker*, 172 U. S. 269, is discussed at length by the court, and distinguished on its facts; as there the abutting owner was assessed for the value of the land taken from herself in order to open a new street.

Broker's Privilege Tax, Interstate Commerce

An act passed in Tennessee in 1899 imposed a privilege tax on all merchandise brokers selling to consumers within the state on orders or samples. In *Stoddard* v. *Morgan*, 58 S. W. 1061, it was sought to enforce this statute against brokers who negotiated sales exclusively for firms without the state and the Supreme Court of Tennessee allows it. It is difficult, if not impossible, to reconcile this case with the case of *Brennan* v. *Titusville*, 153 U. S. 289 (1894), in the U. S. Supreme Court. The court relies for its decision on *Ficklen* v. *Taxing District*, 145 U. S. 1, but that case is easily distinguished, as is done by the court in *Brennan* v. *Titusville*.

Tramp Law

An Ohio statute having first defined a tramp, prescribes special penalties against tramps who do not immediately leave a dwelling-house, or yard or inclosure about a dwelling-house, when requested by the owner to do so, or who are found carrying a firearm or other dangerous weapon. In *State* v. *Hogan*, 58 N. E. 572, the Supreme Court of the state holds that the act does not deprive any persons of the equal protection of the laws and is not violative of the Fourteenth Amendment of the Federal Constitution. The case proceeds on the theory that tramps as a class need special legislation in relation to the provisions of the act; and granting the court the truth of its picture of the "genus tramp," the holding is undoubtedly sound.

CONTRACTS.

Combinations in Restraint of Trade.

The Texas Anti-Trust Law, a well-known statute in consequence of its drastic provisions, is applied by the Court of Civil Appeals of that state in the case of *Comer* v. *Burton-Lingo Co.*, 58 S. W. 969. In that case an owner, on selling his business and good-will to certain firms, agreed not to re-enter such business within a specified time in a certain place; and it appeared that these

CONTRACTS (Continued).

firms were the only dealers in such business in such place, and had combined to buy such business and good-will to prevent competition and to control prices. Under these facts the court held that such agreement, though valid at common law in its view, was void under the anti-trust law, which makes all contracts void where a combination of capital or skill of two or more persons is formed to create or carry out restrictions in trade, or to prevent competition in the sale or purchase of commodities.

In New York, too, we find a recent decision adhering to old rules in spite of modern economic tendencies. In *Cummings* v. *Union Bluestone Co.*, 58 N. E. 525, it appeared that producers controlling 90 per cent of the total production of bluestone agreed to sell through a single agency and to distribute profits according to a schedule agreed upon. They claimed that they had been earning profits merely nominal, in consequence of the severity of competition, and were compelled to this resort to obtain reasonable prices. Nevertheless the court holds the contract void, as "it gave them power to fix arbitrary and unreasonable prices." And this, too, though the article dealt in was not a commodity of prime necessity.

Receipt to be Accepted upon Purchase

In *Harman* v. *Anderson*, 62 Pac. 961, the plaintiff had purchased a bicycle of the defendant, and shortly afterward returned it to the defendant, who took it, giving the plaintiff a receipt for $60, to apply on any new wheel that the plaintiff might select from his stock. Subsequently the plaintiff selected a new wheel and offered the receipt in part payment, but the defendant refused to honor it. Under these circumstances the Court of Appeals of Colorado holds that since the defendant has refused to comply with the plaintiff's demand, or recognize his obligation under the contract, he is liable for $60 in money.

CRIMINAL LAW.

Reasonable Doubt

The disinclination of the courts to give a fixed definition to what constitutes a reasonable doubt appears again in the Mississippi case of *Klyce* v. *State*, 28 Southern, 827. In this case, on a prosecution for manslaughter, the trial court told the jury that a reasonable doubt is one for which "a reason can be given." The Supreme Court holds this instruction erroneous, saying that the juror should be allowed to apply his own conception of what constitutes a reasonable doubt.

CRIMINAL LAW (Continued).

"When the death of the woman is charged as an element of the offence [*i. e.*, abortion] necessary to be proved in order to establish against the accused the graver crime and subject him to the severer punishment, her dying declarations are legal evidence." *State* v. *Meyer*, 47 Atl. 486 (N. J.). The court admits the existence of diverse decisions on this point.

Dying Declarations, Abortion

In *People* v. *Marrs*, 84 N. W. 284, it is held by the Supreme Court of Michigan that the defendant may be convicted of an assault to commit rape, though the jury may find that the complainant did not resist sufficiently to render the offence rape, provided he assaulted her with intent to have intercourse with her against her will, by using whatever force might prove necessary.

Assault with Intent to Commit Rape

Just how far the deliberations of a jury can be investigated and their verdict impeached because of their own irregular conduct, usually presents serious difficulty. In Texas, the code provides that a defendant shall be entitled to a new trial where the jury, after retiring, receives other testimony. In *Ysaguirre* v. *State*, 58 S. W. 1005, this provision was held to authorize a new trial where, while the jury was deliberating, one juryman told another, who was holding out for acquittal, that the defendant had served a term in the penitentiary. The court regarded this evidence, though not legally relevant, sufficiently material to be calculated to influence the verdict of the jury. And the court further held that these facts might be shown by the affidavit of a juror, which was sufficient evidence thereof.

Conduct of Jury, New Trial

In *Roberts* v. *Wells*, 62 Pac. 892, the Supreme Court of Utah holds that "in no case can a judgment for a fine, coupled with imprisonment until the fine is paid, be enforced, when the same judgment and sentence provide for an independent express term of imprisonment."

Fine and Imprisonment

DAMAGES.

The United States Supreme Court holds in *Sigafus* v. *Porter*, 21 Sup. C. R. 34, that the measure of damages in an action for deceit in the sale of property is *not* the difference between the value of the property as it proved to be and as it would have been if as represented, but is the difference between the real value of the property at the date of the sale and the price paid, with in-

Measure of Damages in Cases of Deceit

DAMAGES (Continued).

terest thereon, together with such outlays as were legitimately attributable to the defendant's conduct. This is on the ground that the defendant is bound to make good the loss sustained, but not the expected fruits of an unrealized speculation. A number of decisions of state courts are cited as in accord, among them those of Pennsylvania: *High* v. *Berret*, 148 Pa. 263; and also this is said to be the English view: *Peek* v. *Derry*, L. R., 37 Ch. Div. 541, 591; but the court admits decisions exist holding the opposite view.

Death by Wrongful Act

In an action to recover for the death of the plaintiff's son, the court told the jury that damages might be given in compensation for the loss of his society. But on appeal the Supreme Court of California holds the instruction erroneous; that "it is essentially and alone pecuniary loss to the parent, which he may recover in damages for the death of his child: *Wales* v. *Pacific Electric Motor Co.*, 62 Pac. 932.

Physician's Services

Mere evidence of the number of visits of a physician is not enough to authorize a jury in an action for personal injuries to pass on the value of the services. *Carter* v. *Village of Nunda*, 66 N. Y. Supp. 1059.

DEEDS.

Acknowledgment After Death of Grantor

In *Taft* v. *Simpson*, 84 N. W. 77, the Supreme Court of Michigan holds that where a deed is valid at common law, the fact that the notary did not sign the acknowledgment till after the grantor's death does not invalidate it; and so also when the revenue stamps are not affixed until after the grantor's death, such delay occurring through no fraudulent intent, the deed is good.

Parol Evidence, Covenant Against Incumbrances

The well-known rule that the true consideration for a deed may be shown by parol evidence, though it contradicts the deed, is adhered to by the Court of Civil Appeals of Texas, against the dissent of the chief justice, in a case involving strong considerations against the application of the rule. In *Johnson* v. *Elmer*, 59 S. W. 605, the plaintiff had conveyed land to the defendant, receiving one tract in exchange subject to a vendor's lien. The plaintiff agreed to assume its payment, but requested that mention of the lien be omitted in the deed. A deed *covenanting against incumbrances* was accordingly prepared, making no mention of the lien. It was held admissible

DEEDS (Continued).

to show that part of the consideration was the assumption of the lien, though it contradicted the covenant against incumbrances. The court admits that "the weight of authority is probably in support of the appellant's contention," *i. e.*, that the evidence should be excluded; but finding the question an open one in Texas, it regards the other view as the better.

CONTEMPT.

Avoiding Service of Subpœna

In Michigan an act provided that the trial court might punish by fine and imprisonment for certain acts as contempt, "and for any other unlawful interference with the process or proceedings in any action," and in all other cases where proceedings for contempt had been usually adopted in courts of record to enforce the remedies or protect the rights of any parties. Under this act the Supreme Court of the State, in *Broderick* v. *Genesee Circuit Judge*, 84 N. W. 129, holds that a person who concealed himself to prevent the service of a subpœna in a civil case was not guilty of contempt. The court distinguishes cases which are urged against this holding, as having reference to where one has sought to induce *another* to remain away, whether that other had been subpœned or not. The cases are very similar, but the court adheres to the rule that penal statutes must be strictly construed.

Retroactive Statute Allowing Punishment for Contempt

On the other hand, the line between contempt proceedings and criminal prosecutions is continually being drawn in new cases. Thus in *Judd* v. *Judd*, 84 N. W. 134 (Mich.), we have a case which bears an exceedingly close resemblance to an *ex post facto* law increasing the punishment after the crime has been committed; nevertheless the statute is upheld. In that case, the plaintiff had obtained a divorce from the defendant and a decree for $75 per month alimony. Subsequently the divorced husband refused to pay more than $50 per month. Then the legislature enacted that courts might punish by fine and imprisonment refusals to comply with the order of court for the payment of alimony; and this act was held to be applicable to the case of the defendant in this case and constitutional when so applied.

EVIDENCE.

The common law rule that a person who did not believe in the existence of a God was incompetent to testify is well

EVIDENCE (Continued.)

Competency of Witness

known, but its application at the present time seems to have lately been called in question rather frequently. The Constitution of Kansas provides that no person shall be "incompetent to testify on account of religious belief." Construing this, the Court of Appeals holds that it abrogates the old rule of the common law, a person who does not believe in the existence of a God is competent: *Dickinson* v. *Beal*, 62 Pac. 724. The language of the Constitution easily, and perhaps naturally, will allow an interpretation that does not affect the rule of the common law, namely, that there is to be no discrimination on account of religious belief as to the competency of witnesses. The language seems to presuppose the presence of some form of religious belief and not to contemplate its entire absence. The decision shows, therefore, a rather marked readiness to depart from the old rule, a readiness which, it seems, is appearing in other jurisdictions.

Parol Evidence to Vary a Written Contract

In *Roberts* v. *Greig*, 62 Pac. 574, the Court of Appeals of Colorado holds that where the parties to a note agree at the time of making it that it shall be paid from the proceeds of a certain mill, and that, if there are no proceeds, the note shall be returned and destroyed, parol evidence of such agreement, and that there were no proceeds, is admissible in an action by an indorsee after maturity against the maker. The basis for this decision is stated to be that "the completed delivery of the note was only to happen in the event the mill ran, and the money was gotten out of the operation." The court assumes this position with undisguised reluctance, but regards itself bound by former decisions.

Affirmative and Negative Testimony

The Supreme Court of Utah in *Hann* v. *Rio Grande W. Ry. Co.*, 62 Pac. 908, holds that the general rule of evidence that affirmative testimony is of a higher character and of greater weight than negative testimony is subject to two exceptions: (1) When "negative witnesses," who are credible, and who were in a position where they could readily see and hear what transpired, and directed their attention thereto, testify that they did not see or hear the occurrence testified to by the "affirmative witnesses"; and when (2) negative witnesses who are credible, and were in a position where they could readily see and hear what transpired, and directed their attention thereto, testify positively that the occurrences testified to by the affirmative witnesses did not happen. These rules the court applies to the ques-

EVIDENCE (Continued).

tion of whether the bell of a train had been rung and the whistle blown, and holds error an instruction of the court below that the positive testimony in the case was of a higher character than the negative testimony.

FRAUDULENT CONVEYANCES.

Ejectment was brought by A. against B. on a deed from B. to A. B. set up as a defence that he had executed the deed for the purpose of hindering and delaying, if not defeating his creditors. But the Court of Appeals of Kentucky, in *Elmore* v. *Elmore*, 58 S. W. 980, held that the grantor in a deed could not resist the recovery of the land by the grantee on this ground, since the contract was executed and not executory.

Right of Grantor to Plead Fraud

INJUNCTION.

A rather remarkable injunction is sustained by the Supreme Court of New York County, N. Y., in *Stevenson* v. *Pucci*, 66 N. Y. Supp. 712. The lower court had decreed, among other things, that the defendant, an employer of Italian laborers, should be restrained from allowing his men to use "loud and profane language when engaged on said work, or otherwise, in front of plaintiff's premises or in the hearing of persons therein," and this decree is, so far as this part is concerned, affirmed.

Against Profanity

INSURANCE.

In *Metropolitan Life Insurance Co.* v. *Smith*, 59 S. W. 24, the Court of Appeals of Kentucky holds that where a wife, without her husband's knowledge, procured insurance on his life, and paid therefor with money which he had furnished her for household expenses, he was entitled to recover the money paid, though the company did not know that it belonged to him; and this in spite of the fact that the husband required no account of the wife for the money so furnished her. It might well be under such circumstances that she was allowed to make out of such fund expenditures for herself, and it seems to be going rather far to allow a recovery to the husband.

Procured by Wife on Husband's Life

LICENSE.

Revocability when Acted Upon

In *Ewing* v. *Rhea*, 62 Pac. 790, the facts proved showed that the defendant's grantors silently acquiesced in the construction by the plaintiff, at considerable expense, of an irrigating ditch across their lands. But the Supreme Court of Oregon holds the right thereby gained to be a mere license revocable at will, and that no action lies against the defendant for cutting off the supply of water, so long as the period of limitation has not elapsed. It admits the rule to be different where consideration has been paid, or the party has been encouraged "by any participation in a common enterprise or induced by a definite oral agreement to expend money in making permanent valuable improvements"; but thinks this should not be extended to where the invasion of another's right is acquiesced in.

MARRIAGE.

Impediments Subsequently Removed

A. and B. cohabited together as man and wife and held each other out as such. At the beginning of this relation A. had another wife living. Later this wife died and A. and B. continued their relation as before. Then A., the alleged husband, died, and B. sought to recover on an insurance policy as his wife. In *Barker* v. *Valentine*, 84 N. W. 297, the Supreme Court of Michigan holds that she may recover; that the holding out after the removal of impediments, and the recognition of the parties as husband and wife, will in such case as the present render the parties husband and wife in the eye of the law on the ground that a valid marriage will be presumed to have occurred after the impediment was removed. Earlier Michigan cases, apparently holding the opposite view, are distinguished on the ground that in them the question arose between the parties to the alleged marriage.

MASTER AND SERVANT.

Fellow-Servants, Negligence of Superior

In Kentucky the courts hold that "the master is responsible for the negligence of his superior servant to one under his control for an injury thereby caused him." In *Illinois Central Railroad Co.* v. *Coleman*, 59 S. W. 13, the Court of Appeals of the state holds this rule applicable where the superior was not at the time acting merely as a director of the labor, but was himself engaged with the laborer in operating a lever used in uncoupling cars; the court regarding it as making no difference

MASTER AND SERVANT (Continued).

whether the negligent act was done by his own hands or by another under his orders.

A result almost, if not quite, the opposite of this is reached in the case of *Ross* v. *Union Cement and Lime Co.*, 58 N. E. 500, by the Appellate Court of Indiana. In that case the plaintiff was employed in removing rock from the floor of defendant's tunnel, and a large stone was thrown in the tunnel by blasting, and the loose rock surrounding and supporting such stone formed the material on which the plaintiff and others were engaged, and the act of one of such employes, who was *tunnel boss*, caused the large rock to fall on the plaintiff, injuring him, for which injury suit was brought. The court holds that judgment should be given for the defendant, since the tunnel boss in such employment was a fellow-servant of the plaintiff and was not charged with the great substantive duties of the master, for the exercise of which by such vice-principal or superior servant the master would have remained liable.

RES GESTÆ.

Declarations After Regaining Consciousness

How closely the declarations must be connected with the actual occurrence which is the subject of the issue seems a question of ever-recurring difficulty. No standard of time, apparently, solves the various phases which the facts assume. Thus in *Missouri K. & T. Ry. Co.* v. *Moore*, 59 S. W., 282, the witness had been rendered unconscious in consequence of a railroad accident, and did not recover consciousness for about twelve hours. Yet the Court of Civil Appeals of Texas holds that what he then said was admissible as part of *res gestæ*.

SPECIFIC PERFORMANCE.

Parol Contract, Part Performance

The ordinary rule that the payment in whole or in part of the purchase money is not such a part performance as will justify the court in avoiding the Statute of Frauds and decreeing specific performance, where the contract is not evidenced by a writing, is slightly modified in the case of *Jorgenson* v. *Jorgenson*, 84 N. W. 221. In that case there was not the evidence required by the statute, but the court decrees specific performance, and the basis of its decision is that the purchase money was paid more than six years previously, and that hence to refuse

SPECIFIC PERFORMANCE (Continued).

specific performance would work great hardship on the proposed vendor, since his action to recover it back would be barred by the Statute of Limitations. Some improvements had been made by the plaintiff, but this is not made a basis of the decision, since, the court says, "the use of the land during the time since the contract was entered into more than compensated plaintiff for all improvements made thereon, and he can claim no particular loss or injury because of such improvements."

So in *Clancy* v. *Flusky*, 58 N. E. 594, it is held that an agreement of a father to give his farm to his sons if they would move upon it, cultivate and improve it, and furnish him a home with them, will be enforced, they having done their part, though he, without sufficient cause, went away; and the court holds that there is sufficient part performance to order the contract specifically performed, though the Statute of Frauds has not been complied with. One judge dissents without assigning any reasons.

STREET RAILWAYS.

A passenger on a street car is entitled not only to time to step off, but also to time to clear her skirts, where they catch on an appliance on the platform. "It is the duty of the conductor to see that she is clear from any such attachment before he starts the car. If he starts before he knows that she is thus free, it is a negligent method of starting and he takes the chances": *Smith* v. *Kingston City R. Co.*, 67 N. Y. Supp. 185.

Time to Alight

A street-railway company is liable for damages resulting in consequence of its failure to keep its tracks in safe condition, though they may have been laid in a manner perfectly safe and their subsequent unsafe character be due to the sinking of the street: *Groves* v. *Louisville Ry. Co.*, 58 S. W. 508 (Ky.). This liability exists notwithstanding the municipality is also responsible for the safety of the streets, and arises out of the continuing duty of the street-railway company to see to it that its tracks do not become a source of danger.

Duty as to Repair of Streets

SUBSURFACE WATER.

The question as to the right to sink wells and pump water to such an extent as to injure lands of others, arises in the

SUBSURFACE WATER (Continued).

Right of Landowner

New York case of *Forbell* v. *City of New York*, 58 N. E. 644. In that case owners of land making merchandise of large quantities of water, drew this water from wells located on their own land. These they had sunk, aware, "at least to a business certainty," that they were sinking them in such a place as to exhaust the supply for neighboring land to a considerable distance around. This was the effect; and the result of the operation being that the neighboring owners could not grow crops thereon, an injunction is brought by them to restrain such use of the wells, and the injunction is granted by the Court of Appeals. The court recognises the old cases as to the unrestricted right to the use of percolating waters, but regards the *knowledge* of the defendants as to the nature of the flow of the subsurface water as an element which renders inapplicable former decisions allowing unrestricted enjoyment of percolating water.

TAX SALE.

An exception to the ordinary rule that a tenant may not deny his landlord's title during the tenancy seems to be laid

Purchase by Tenant

down by the Supreme Court of Kansas in the case of *Smith* v. *Newman*, 62 Pac. 1011. In that case A., the tenant, got a conveyance from a third party who had gotten a tax deed for the property, which had been sold for taxes, and later another tax deed for further taxes which were in default was issued to A. He refused after securing the first deed to pay rent, and ejectment being brought by B., the landlord, he set up this title, and the defence is allowed by the court, holding that "a tenant under no obligation or duty to pay taxes may purchase" the property at a tax sale made during his term, and resist recovery by his former landlord for rent accruing after the tax sale, by virtue of an adverse title so acquired."

TRIAL.

Some recollections of the old rules in regard to juries and their oversight by the court were apparently in the mind of the trial judge in the case of *Fairbanks, Morse & Co.* v. *Weeber*,

Power o Court Over Jury

62 Pac. 368. At four o'clock on the second day after the submission of the case he called in the jury and told them they would be confined till the following Tuesday morning (it being then Saturday) unless they agreed on a verdict, and would not receive more than one meal a day.

TRIAL (Continued).

This seems to have had a beneficent influence in reconciling the different opinions of the jurors, but the Court of Appeals of Colorado holds it reversible error, as an indirect means of compelling a verdict. The court, however, expressly reserves its opinion as to its holding in case a jury were treated in the way threatened, provided no threat was actually made. Apparently it regards this a totally distinct question, the making of the threat being, it seems, the turning point.

TRUSTS.

How much notice is necessary to the *cestui que trust* upon the creation of the trust seems, like the question of the necessity for an acceptance of a deed, to recur continually. In *Robertson* v. *McCarthy*, 66 N. Y. Supp. 327, it is again flatly presented, and the court decides it is not necessary that the *cestui que trust* should know of the creation of the trust. In that case A. deposited money in his own name, "in trust for B., brother." B. knew nothing of this. Upon A.'s death, B. was held entitled to the fund. It is held that the trust, if so intended, is irrevocable from the time of the deposit, and proof of the fact that depositor subsequently withdrew some for his own use (as in this case) does not show a different intention nor defeat the trust.

Undisclosed Deposit

TRUSTEES.

In *Parmenter* v. *Barstow*, 47 Atl. 365, the Supreme Court of Rhode Island holds that though trustees who have the full legal title to land have the ordinary duties and liabilities which are incident to the ownership of real estate, and consequently the duty to keep the sidewalk in repair, nevertheless recovery cannot be had against them in their official capacity for the negligence of their servants in the repair of such sidewalk. This is on the ground that the law will not allow trust property to be impaired by the trustee's negligence.

Liability for Negligence in Repair of Sidewalk

WILLS.

In *Ametrano* v. *Downs*, 67 N. Y. Supp. 128, the Supreme Court of Kings County holds that where the testatrix had devised her interest in real estate in fee, and afterward and before her death the land was taken under eminent domain proceedings, the devisee was not, on the death of the testatrix, entitled to the moneys

Devise, Condemnation of Estate

WILLS (Continued).

received by the testatrix as damages, since the condemnation revoked the devise. The court holds the same rule applicable as in the case of a voluntary sale.

Life Tenant's Interest in Personalty

The conflicting interests of life tenant and remainderman in real property were at a pretty early period of the common law thoroughly worked out. But with the subsequent allowance of future interests in personalty similar questions arose which still form the issue in no small number of cases. In *In re Chapman*, 66 N. Y. Supp. 235, a testator gave the income of his estate to his wife for life and provided that an investment in a certain steamship be continued. The right of the wife to the profits (and not merely to interest) seems not to have been contested, and thus the difficulty in the English case of *Brown* v. *Gellatly*, L. R., 2 Chan. App. 751 (1867), was avoided. It will be remembered that there the executors were to sail the ships until a suitable time for selling and the income was held to be capital, the life tenant being allowed only interest. But in the case in hand the executor claimed the right to hold back part of the property in order to provide against depreciation in the value of the ship. It was held that this was not allowable, but that the widow was entitled to all. The court proceeds not so much on the general rules governing the extent of life tenant's interest in personalty, as on the ground that this was the intention of the testator.

A similar question arose in Massachusetts in the case of *D'Ooge* v. *Leeds*, 57 N. E. 1025. In that case part of the property devised consisted of shares in a joint-stock company which at that time had in its possession a fund used according to its rules for the payment of losses and the protection of stockholders from personal liability for debts. Thereafter bonds were issued to the stockholders on such accumulated fund and interest paid on bonds only from such proceeds of the reserve as should be applicable after making provision for the payment of all debts of the company. As between the claims of the life-tenant and the remaindermen to these bonds the court held for the latter, regarding the bonds as capital. The court enters into a discussion of the difference between principal and income, and refers to the confusion in the English cases on this subject, but holds that in Massachusetts the rule is well established and everything is made to turn upon the action of the corporation, the law regarding "cash dividends, however large, as income, and stock dividends, however made, as capital." This also is the rule in the United States Supreme Court: *Gillons* v. *Mahon*, 136 U. S. 549.

WILLS (Continued).

Specific Bequests

In *Currier* v. *Currier*, 47 Atl. 94, the Supreme Court of New Hampshire inclines to a somewhat unusual view as to a specific bequest. In that case the testator devised "one-third part of all my real estate in the city of F." to his wife; and also "one-third of my personal property of which I may die possessed." The first provision is held to be clearly a specific devise, and the second the court is prepared to believe is a specific legacy on analogous principles, but avoids a decision of the point by basing its construction of the will on its conception of the intention of the testator.

Burden of Proof as to Testamentary Capacity

Where it came out in proponent's testimony that testatrix was an invalid and much enfeebled, and some other facts tending to raise the question of testamentary capacity, it was held by the Surrogate's Court of Suffolk County, New York, that the burden is on him to show not merely execution, but he must show testamentary capacity, and unless he does probate will be denied: *In re De Castro's Will*, 66 N. Y. Supp. 239.